

No. 89-699

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Supreme Court, U.S.  
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In The  
**Supreme Court of the United States**  
October Term, 1989

COLORADO DEPARTMENT OF REVENUE,  
*Petitioner,*  
v.

UNITED STATES OF AMERICA, et al.,  
*Respondent.*

On Petition For Writ Of Certiorari  
To The United States Court Of Appeals  
For The Tenth Circuit

REPLY BRIEF IN SUPPORT OF PETITION  
FOR WRIT OF CERTIORARI

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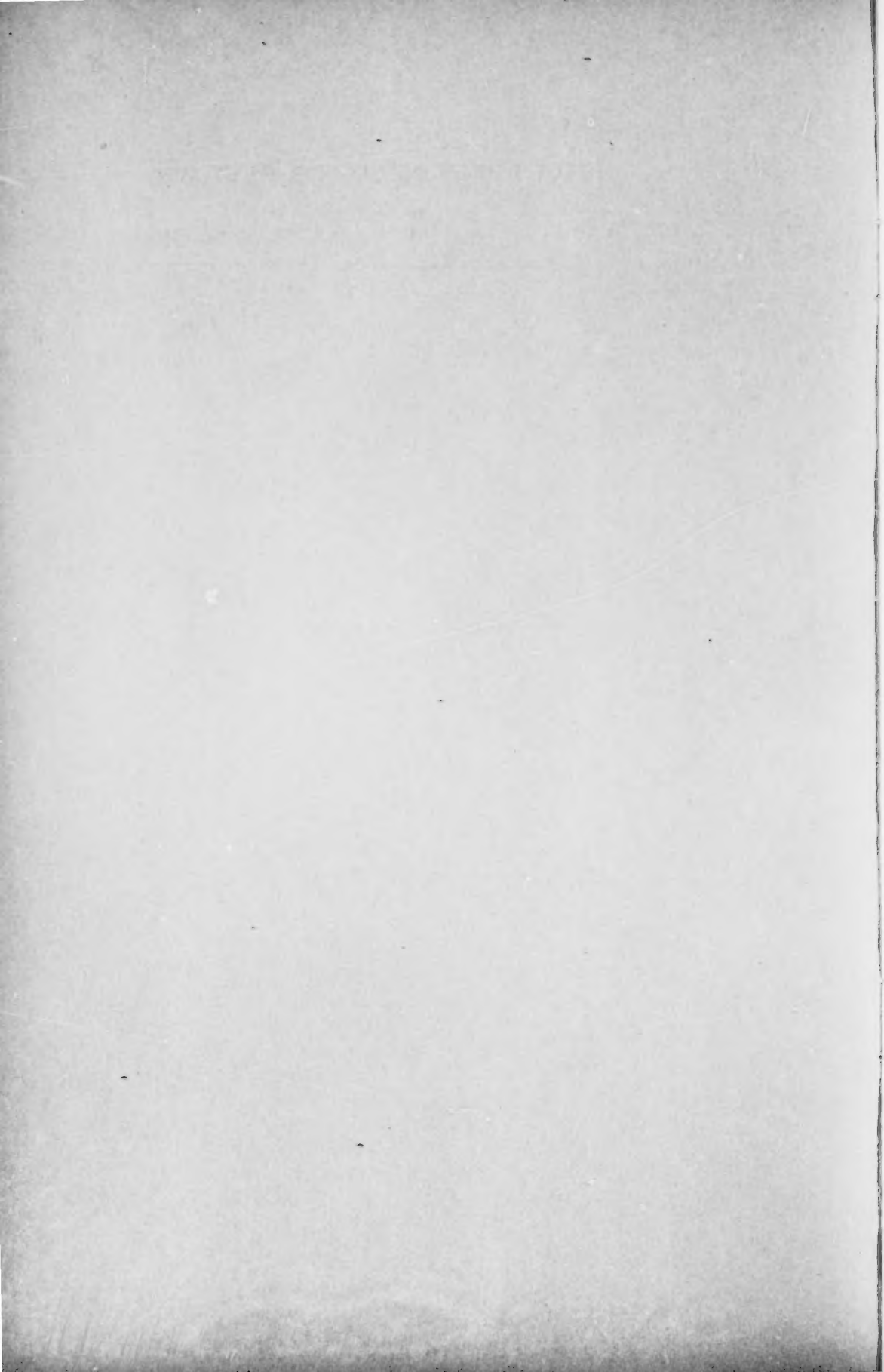
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## ISSUES PRESENTED FOR REVIEW

1. Whether the relation-back doctrine applies to unpaid taxes that are owed to the state prior to an order of forfeiture being entered by the court pursuant to 21 U.S.C. § 881(a)(6) (1979)?

# TABLE OF CONTENTS

	Page
ISSUES PRESENTED FOR REVIEW .....	i
ARGUMENT	
THE RELATION-BACK DOCTRINE DOES NOT APPLY TO UNPAID TAXES THAT ARE OWED TO THE STATE PRIOR TO AN ORDER OF FORFEI- TURE BEING ENTERED PURSUANT TO 21 U.S.C. § 881(a)(6) (1979).....	1
CONCLUSION .....	3

## TABLE OF AUTHORITIES

### CASES

Caplin & Drysdale Chartered v. United States, 109 S.Ct. 2646 (1989).....	1, 2
United States v. City of New Britain, 347 U.S. 81 (1954) .....	2
United States v. Trotter, 58 U.S.L.W. 2304 (U.S. Nov. 28, 1989) (No. 88-2753).....	2

### STATUTES

21 U.S.C. § 853(c) (1982 Supp.) .....	1
21 U.S.C. § 881(a)(6) (1979) .....	1, 3
21 U.S.C. § 881(h) (1984).....	1, 2

## ARGUMENT

### THE RELATION-BACK DOCTRINE DOES NOT APPLY TO UNPAID TAXES THAT ARE OWED TO THE STATE PRIOR TO AN ORDER OF FORFEITURE BEING ENTERED PURSUANT TO 21 U.S.C. § 881(a)(6) (1979)

The United States argues in brief (U.S. 6) that under 21 U.S.C. § 881(a)(6) (1979) the currency was forfeited to the United States at the time that the act was committed, even though the State's tax liens attached before there was an order of forfeiture entered. In reliance upon this argument the United States cited the recent decision of *Caplin & Drysdale Chartered v. United States*, 109 S. Ct. 2646 (1989) where this Court applied the Relation-Back Doctrine to a case involving the provisions of 21 U.S.C. § 853(c) (1982 Supp.). The forfeiture provision in 21 U.S.C. § 853(c) is more specific than the forfeiture provision of 21 U.S.C. § 881(a)(6). Section 21 U.S.C. § 853(c) stated in pertinent part that "[a]ll right, title and interest in (forfeited) property . . . vests in the United States upon the commission of the act giving rise to forfeiture." The language in 21 U.S.C. § 881(a)(6) states that the property "shall be subject to forfeiture." Herein the forfeiture provision under 21 U.S.C. § 881 (1979) is not an automatic forfeiture as the forfeiture provision contained in the language of 21 U.S.C. § 853(c).

The United States reliance on 21 U.S.C. § 881(h) (1984) as support for its relation-back argument is also misplaced for two reasons (U.S. 8). First, at the time that this case was initiated in 1982, subsection (h) of 21 U.S.C. § 881 had not been enacted. Congress amended section 881 in 1984 by adding a new subsection (h), to nullify transfers made by the original owner while the forfeiture

action was pending. *United States v. Trotter*, 58 U.S.L.W. 2304 (U.S. Nov. 28, 1989) (No. 88-2753). There is no evidence that Congress intended to make subsection (h) of 21 U.S.C. § 881 retroactive to apply to forfeiture actions presently pending.<sup>1</sup>

Secondly, In *United States v. Trotter, supra*, recently decided by the Eighth Circuit Court of Appeals on November 6, 1989, the Court of Appeals rejected a similar argument by the United States on whether the relation-back doctrine of 21 U.S.C. § 881(h) barred the district court from satisfying criminal fines out of seized funds. The Court of Appeals held that "the relation-back rule of section 881 does not defeat transfers ordered by the district and made to federal government creditors . . . [T]he section at issue (881 (h)) was merely meant to prevent non-governmental transfers pending the outcome of whatever proceeding was brought. We conclude that the district court's order was proper." *Id.* at 2304.

At the time that this forfeiture claim was filed by the United States the state's tax claims were perfected and choate and entitled to full faith and credit. See *United States v. City of New Britain*, 347 U.S. 81 (1954). In addition, this court is *Caplin & Drysdale, Chartered v. United States, supra* at p. 2676, has recognized that the defendant prior to conviction has sole title to the assets. Furthermore, in *dicta* this court stated that "the IRS could levy a legal claim against the defendants for the sums at issue, at the time of Assessment." *Id.* at 2676 n.15. The district

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<sup>1</sup> District Court issued its Order May 29, 1984.

court was correct in its decision that the forfeiture provision of section 21 U.S.C. § 881(a)(6) did not prevent the State of Colorado from levying and enforcing its tax liens prior to an order of forfeiture being entered.

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### CONCLUSION

The Tenth Circuit's decision denying the State of Colorado a first and prior lien for its taxes must be reversed.

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